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No. 85-530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DENNIS M. O'CONNOR, ET AL.,
Petitioners,

v.

MAGNO J. ORTEGA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL EDUCATION ASSOCIATION AS AMICI CURIAE SUPPORTING RESPONDENT

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL EDUCATION ASSOCIATION AS AMICI CURIAE SUPPORTING RESPONDENT

INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by the Constitution.

The National Education Association ("NEA") is a nationwide employee organization, with a current membership of over 1.8 million. The vast majority of NEA's members are educators in public schools, colleges, and universities.

The primary issue in this case—whether and to what extent the Fourth Amendment protects public employees

from warrantless searches by their employers—directly implicates the rights of all NEA members, and will have a great impact on the rights of public employees throughout the country.

With the consent of the parties, we file this brief *amici curiae* in the belief that it will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

I. The general search and seizure conducted in this case was unreasonable under the standards recently declared in *New Jersey* v. *T.L.O.*, —— U.S. ——, 105 S. Ct. 733, 744 (1985).

First, Petitioners' action was unjustified at its inception. Petitioners' own description shows that they were engaged in an investigatory search, rather than a mere "inventory" as they would characterize it. Such a search is unreasonable unless authorized by a valid search warrant, except in certain carefully defined classes of cases, none of which is applicable here. Even if no warrant were required, the search was constitutionally defective because it was unreasonable "under all the circumstances." *T.L.O.*, 105 S. Ct. at 743. Petitioners should have sought to obtain these materials from Respondent rather than compelling his absence and then entering and searching his locked office and seizing the materials therein.

Second, even if Petitioners' search had been justified at the inception, it still would have been unreasonable in scope. The "measures adopted" by Petitioners were not "reasonably related to the objectives of the search and not excessively intrusive" as *T.L.O.* requires. *Id.* at 744. It is basic Fourth Amendment law that a justified entry to search for a particular item or items does not permit a wholesale search and seizure of other property such as

occurred here. *See, e.g., Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 325-28 (1979).

II. Petitioners, joined in large part by the United States, propose an extremely restrictive view of the Fourth Amendment rights of public employees. Their respective positions are without merit.

It is by now well settled that the Constitution protects public employees in their relations with their government employer. *See, e.g., Perry* v. *Sindermann*, 408 U.S. 593, 597, 599 (1972) (Fourteenth Amendment right not to be deprived of property without due process of law); *Uniformed Sanitation Men Association* v. *Commissioner of Sanitation*, 392 U.S. 280, 284-85 (Fifth Amendment privilege against self-incrimination). Employee Fourth Amendment rights stand on no lesser footing. *Cf. T.L.O., supra*, rejecting the contention that public school students have no Fourth Amendment right of privacy while at school.

Petitioners assert that "a public employee's right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the need of agency officials and supervisors to have access to the offices of public employees, and their contents, to monitor performance, administratively investigate work-related conduct, or merely to retrieve government records." (Pet. Br. at 16). This position is entirely mistaken in principle. Individual expectations of privacy are not unreasonable for purposes of the Fourth Amendment simply because the government has a need to make an unfettered search. *E.g., United States* v. *U. S. District Court*, 407 U.S. 297, 312 (1972); *T.L.O., supra*, 105 S. Ct. at 742-43. Moreover, the claim that an unfettered right to enter and search employees' offices is administratively necessary is wholly unsupported and, as the record in this case illustrates, is unsupportable.

ARGUMENT

Introduction

While Petitioners and the United States stop short of asserting, in so many words, that a public employee is wholly unprotected by the Fourth Amendment against entry into and searches of his office, both take an exceedingly narrow view of the Fourth Amendment protections. Petitioners contend that "[a] public employee's right of privacy in traditional Fourth Amendment terms is *fundamentally incompatible* with the need of agency officials and supervisors to have access to the offices of public employees, *and their contents* * * *." (Pet. Br. at 16; emphasis added.)[1] The United States, in turn, asserts that "a government employee has no reasonable expectation that a supervisor or co-employee *will not enter his office* in the course of performing employment-related duties." (U.S. Br. at 8; upper case omitted, emphasis added.)

On the latter issue, both briefs rely heavily on this Court's recent decision in *New Jersey* v. *T.L.O.*, —— U.S. —— 105 S. Ct. 733 (1985). (Pet. Br. at 22-25; U.S. Br. at 15-17.) We agree that *T.L.O.* provides the appropriate framework for analysis of the reasonableness of the search in this case; but, as we show in Part I of our brief, under the standards there reaffirmed, the search of Respondent's office was clearly unreasonable and violated the Fourth Amendment. In Part II of the brief, we show that *T.L.O.*'s principal holding—which rejected the State's contention that a student has no reasonable expectation of privacy in a public school setting—requires rejection likewise of the respective views of the Petitioners and the United States with respect to the reasonableness of a public employee's expectation of privacy in his office and the contents thereof.

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[1] Brief for Petitioners is referred to throughout as "Pet. Br." Brief for the United States as Amicus Curiae in Support of Petitioners is referred to throughout as "U.S. Br."

I. The General Search And Seizure Conducted In This Case Was Unreasonable

This Court reaffirmed in *New Jersey* v. *T.L.O.* that:

> [d]etermining the reasonableness of *any* search involves a twofold inquiry: first, one must consider "whether the * * * action was justified at its inception," *Terry* v. *Ohio*, 392 U.S., at 20, 88 S. Ct. at 1879; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," *ibid.* 105 S. Ct. at 744 (emphasis added).

Although both Petitioners and the United States seek to justify the search and seizure in this case largely as a routine "inventory" search, neither can escape the fact that the search occurred in connection with the hospital's pending investigation into sexual harassment and other charges against Respondent. Petitioners concede that the search and seizure was directed by the "investigative team" looking into those charges (Pet. Br. at 4), and the United States admits that the search was "in furtherance of the administrative investigation and in light of the incident with the computer" (U.S. Br. at 3; *see also id.* at 7 (the purpose of the search was "to locate state property in connection with an administrative investigation into [Respondent's] malfeasance on the job")). Whatever the proffered justification, the search was unreasonable both (a) at its inception and (b) as actually conducted.

A. To the extent the purpose of the search was investigative, the search was unjustified at its inception because a warrant was required. "[I]t is settled for purposes of the [Fourth] Amendment that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.'" *Mancusi* v. *DeForte*, 392 U.S. 364, 370 (1968), *quoting*

Camara v. *Municipal Court*, 387 U.S. 523, 528-29 (1967). The few exceptions to the warrant requirement are narrow and arise in circumstances not present here. *See Chimel* v. *California*, 395 U.S. 752, 762-63 (1969) (search incident to arrest); *Ker* v. *California*, 374 U.S. 23 (1963) (exigent circumstances); *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973) (valid consent). *See also* pp. 13-16, *infra*.

Administrative searches in connection with investigations may not be conducted without a warrant except where the government can show that "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara* v. *Municipal Court*, 387 U.S. 523, 533 (1967). The Court held in *T.L.O.* that the warrant requirement is unsuited to dealing with students in the public school environment because the delay involved "would unduly interfere with the maintenance of the swift and informal disciplinary proceedings needed in the schools." 105 S. Ct. at 743. In this case, however, Petitioners have made no showing that obtaining a warrant would have jeopardized the effectiveness of their investigative search. Nor could they. Having banned Respondent from the hospital grounds and forbidden him from returning without their prior written approval,[2] Petitioners had ample time to secure a warrant—which, if not necessary for the initial entry into the office, plainly would have been required for an investigative search and seizure of Respondent's personal possessions. Since even the "special circumstances applicable to domestic security surveillances" do not justify an exception to the warrant requirement, *United States* v. *United States District Court*, 407 U.S. 297, 318-21 (1972), surely the search by the hospital security guard and other officials in this case merits no exception either.

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[2] 764 F.2d at 704. We rely generally in this brief upon the facts set forth in the Brief For Amicus Curiae Appointed By The Court In Support Of Respondent, and do not burden the Court with another iteration of them.

Petitioners' argument that no warrant was needed depends ultimately upon their *ipse dixit* that the search here was merely an "inventory." Petitioners claim to use the term solely "[f]or purposes of consistency and simplicity" (Pet. Br. at 8 n.5), but they frame both their question presented and entire argument around the conclusion that the search was only an "inventory." As Chief Justice Burger stated in an analogous situation, "[t]his cryptic conclusion seems to ignore the ancient wisdom that calling a thing by a name does not make it so." *Madison School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 174 (1976). In view of the investigative character of the search and Petitioners' notable failure to present facts that would support the conclusion that obtaining a warrant would have been unduly burdensome, Petitioners have failed to overcome the constitutional preference for a warrant.

The outcome in this case would be the same, however, if no warrant were required. Even if the search here were properly characterized as an "inventory" search, and even if it were analyzed under the relatively loose Fourth Amendment balancing test applied by the Court in *T.L.O.* to the special circumstances of the search of a public school student's property, the search would still be constitutionally defective because unreasonable "under all the circumstances." *T.L.O.*, 105 S. Ct. at 743. Petitioners conjure up images—having nothing to do with the actual record of this case—of public employees' interdicting one another from entering their respective "allocated office space[s]" (U.S. Br. at 8) to obtain a file or a book (Pet. Br. at 16; U.S. Br. at 11). While there may be difficult public employee Fourth Amendment cases in the future—just as there are difficult public employee First Amendment cases, *see, e.g.*, *Connick* v. *Myers*, 461 U.S. 138 (1983)—Petitioners' conduct "cuts so close to the core of constitutional freedom as to make it quite needless in this case to examine the periphery," *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York*, 360 U.S. 684, 689 (1959).

Dr. Ortega's hospital office was a professional office. It displayed his name on the door. It contained the confidential files of his psychiatric patients, as well as his own personal and professional papers and effects. It was secured by a locked door. And during the 17 years he occupied the office, no one previously had entered it without his permission. Given Respondent's obviously legitimate expectation of privacy in his office, and even accepting at face value Petitioners' representation that their search of Dr. Ortega's office was "no more than an attempt to sort government property from respondent's" (Pet. Br. at 25), Petitioners at a minimum should have contacted Dr. Ortega in advance to ask his permission to enter the office, to try to arrive at a compromise solution, to seek his assistance in identifying hospital property, or to elicit information from him that would have made a search unnecessary.

The course Petitioners pursued was not reasonably calculated to achieve their stated objective of identifying state property. Petitioners made certain that Dr. Ortega was absent when they entered his office (*see, e.g.*, U.S. Br. at 2), yet, without his assistance, their subsequent attempt to determine whether his patient files and other property were state or personal proved "impossible." (Pet. Br. at 8 n.5.) Had Petitioners contacted Dr. Ortega, they would have discovered that the computer Dr. Ortega was rumored to have stolen was not state property, 764 F.2d at 704, and in fact still remained on hospital grounds (in the office *adjoining* his). *Id.* They also apparently would have learned that the only state property contained in Dr. Ortega's office was his office furniture, and that he maintained his hospital records separately in two file cabinets outside his office door. *Id.*[3] In sum, they would have learned that no search of

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[3] The United States criticizes the Court of Appeals for accepting Respondent's declaration of this fact (U.S. Br. at 9), but Petitioners do not dispute it.

Dr. Ortega's office was necessary, certainly not a search without his being present.[4]

B. Even if Petitioners' search had been justified at its inception, it still would have been unreasonable in scope. At a minimum, "the measures adopted" in such a search must be "reasonably related to the objectives of the search and not excessively intrusive * * *." *T.L.O.*, 105 S. Ct. at 744. The general search and seizure conducted by Petitioners was neither.

First, it far exceeded any legitimate state interest in an "inventory" search. As the Court of Appeals observed: "Office inventories were apparently reserved for employees who were departing or terminated. When Ortega's office was searched, he was neither scheduled to depart nor had he been terminated." 764 F.2d at 705-06. And Petitioners' erroneous suspicion that Dr. Ortega had stolen a computer did not justify their sweeping search and seizure of all of his files and personal belongings. It is basic Fourth Amendment law that a justified entry to search for a particular item or items does not permit a wholesale search and seizure of other property such as

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[4] The United States' extraction of dicta from *Mancusi* v. *DeForte*, 392 U.S. 364 (1968), to justify the search is unavailing. (*See* U.S. Br. at 8-9.) This Court held in *Mancusi* that an employee had standing to object to the search and seizure by government officials of business papers in the employee's custody. The Court observed that the employee, a union official, was entitled to expect that the papers would not be seized without "his permission or that of his union superiors." 392 U.S. at 369. The United States cites the Court's use of the words, "or that of his union superiors," to mean that an employer has the right to search his employee's papers. (U.S. Br. at 8-9.) This is not so. Unlike the papers and effects seized here, the papers in *Mancusi* belonged to the *employer*, not to the employee. 392 U.S. at 367. This Court's dicta merely reflected the obvious truth that the employer had the right to give its own papers to the government. If anything, *Mancusi* supports affirmance in this case, for the Court found that employees have legitimate expectations of privacy even in papers that they do not own but merely maintain in *non*-private office areas.

occurred here. *See, e.g., Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 325-28 (1979).

For the same reason, the search also was unnecessarily intrusive as an investigative search. The search was unlimited, unparticularized, and "reminiscent of the general warrant or writ of assistance of the 18th century against which the Fourth Amendment was intended to protect." 442 U.S. at 325.

Contrary to assertions made both by Petitioners and by the United States as *amicus curiae*, this case does not concern some nebulous right of a public employee to be secure in his "allocated office space." (U.S. Br. at 8; Pet. Br. at 16.) Rather, this case turns upon the Fourth Amendment's explicit protection of a person's "papers and effects"—specifically, Respondent's personal correspondence, the confidential medical files of his private, non-hospital patients, his appointment books and notes, family photographs, and other personal documents and materials maintained in his locked hospital office. The general, unconsented search and seizure of these papers and effects from Respondent's locked hospital office was unreasonable under any of the arguably applicable Fourth Amendment standards.

II. The Fourth Amendment Prohibits Government Employers From Unreasonably Searching And Seizing The Personal Papers And Effects Of Government Employees

A. Petitioners grudgingly acknowledge that "a public employee does not relinquish constitutional rights by virtue of public employment." (Pet. Br. at 10, *citing Pickering* v. *Board of Education*, 391 U.S. 563 (1968).) (*See also* U.S. Br. at 12.) This acknowledgment is entirely justified.

In *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972), the Court summarized what, at that time, was already well-established principle:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser* v. *Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

Justice Stewart added, "[m]ost often, we have applied the principle to denials of public employment." *Id.* Among the dozen cases cited for that proposition were those involving the First Amendment right of freedom of religion,[5] freedom of speech,[6] and freedom of association.[7] The Court also held in *Perry* and its companion case, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), that a public employee enjoys the Fourteenth Amendment right not to be deprived of property without due process of law. So too, "public employees are entitled, like all other persons, to * * * the privilege against self-incrimination." *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation*, 392 U.S. 280, 284-85 (1968); *see also Gardner* v. *Broderick*, 392 U.S. 273 (1968). Employee Fourth Amendment rights stand on no lesser footing.

Moreover, "petitioners recognize * * * that Fourth Amendment strictures apply to state officials, whether

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[5] *E.g., Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

[6] *E.g., Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

[7] *E.g., Shelton* v. *Tucker*, 364 U.S. 479 (1960).

criminal or civil, in safeguarding reasonable privacy interests against arbitrary governmental invasion." (Pet. Br. at 9, *citing New Jersey* v. *T.L.O.*, —— U.S. ——, 105 S. Ct. 733 (1985).) In *T.L.O.*, this Court rejected the State's contention "that the history of the Fourth Amendment indicates that the Amendment was intended to regulate only searches and seizures carried out by law enforcement officers; accordingly, although public school officials are concededly state agents for purposes of the Fourteenth Amendment, the Fourth Amendment creates no rights enforceable against them." 105 S. Ct. at 740.

Notwithstanding the foregoing, Petitioners contend "that the Fourth Amendment does not apply to an entry into and inventory of a public employee's government-assigned office by agency administrators in the context of supervision or administrative investigation into work-related conduct." (Pet. Br. at 14.) In so arguing, Petitioners rely on three lines of cases, which we shall discuss seriatim.

1) The first of these relates to the authority of government to control and discipline its employees. (*See* Pet. Br. at 10-12.) That authority is simply not at issue in this case; even if it were, the decisions of this Court, such as *Pickering* and *Sindermann*—as well as Justice Powell's opinion in *Arnett* v. *Kennedy*, 416 U.S. 134, 164-67 (1974), which Petitioners cite (Br. at 10)—establish that the exercise of that authority is subject to constitutional constraints.[8]

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[8] This is recognized by *Bush* v. *Lucas*, 462 U.S. 367 (1983), which Petitioners quote at length. *Bush* holds that the "elaborate remedial system that has been constructed step by step with careful attention to conflicting policy considerations" under the federal service laws is not to be "augmented by the creation of *a new judicial remedy for the constitutional violation at issue.*" *Id.* at 388 (emphasis added). *Bush* does not hold that the employment relationship cannot give rise to "a constitutional tort," let alone touch upon the scope of the rights of government employees under

2) Next, Petitioners seek to analogize this case to *Wyman* v. *James*, 400 U.S. 309 (1971), which held that a social worker's home visitation for the purpose of monitoring health and decency conditions and verifying justification for financial assistance was not a search "in the Fourth Amendment meaning of that term." (Pet. Br. at 12-13, *quoting id.* at 317.) In so doing, Petitioners wrest out of context *Wyman*'s distinction between such visitations and a "search in the traditional criminal law context." *Id.* It is plain that the quoted passage cannot be taken—and we do not believe that it was intended in *Wyman*—to be a holding that a search for Fourth Amendment purposes can arise only out of a criminal investigation.[9] *T.L.O.* disapproved just that proposition, observing that:

> this court has never limited the amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon "governmental action"—that is, "upon the activities of sovereign authority." *Burdeau* v. *McDowell*, 256 U.S. 465, 475. 105 S.Ct. at 740.

3) Petitioners also rely on two "business inspection cases that hold voluntary entry into an industry 'closely regulated' by government removes reasonable expectations of privacy related to the object of regulation." (Pet. Br. at 13-14, *citing United States* v. *Biswell*, 406 U.S. 311 (1972), *Colonnade Catering Corp.* v. *United*

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any constitutional provision. Nor does the case affect the remedy Congress has provided in 42 U.S.C. § 1983 for constitutional violations under color of state law.

[9] In the immediately succeeding sentence the *Wyman* opinion notes "that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act." *Id.* In this respect, *Wyman* differs *toto coelo* from the forced entry in this case, which Respondent was given no opportunity to prevent.

States, 397 U.S. 72 (1970).) The limited scope of those decisions was stressed by this Court when the Solicitor General relied on them in *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 309 (1978), to urge the constitutionality of warrantless searches by agents of the Secretary of Labor to inspect the work areas of employment facilities for safety hazards and violations of regulations:

> Certain industries have such a history of government oversight that no reasonable expectation of privacy, see *Katz* v. *United States*, 389 U.S. 347, 351-352 (1967), could exist for a proprietor over the stock of such an enterprise. Liquor (Colonnade) and firearms (Biswell) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation. * * * The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. "A central difference between those cases [*Colonnade* and *Biswell*] and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him." *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973). The clear import of our cases is that the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception. The Secretary would make it the rule. 436 U.S. at 313.

Like the Solicitor General in *Barlow's*, Petitioners here contend:

> In the context of supervision and administration, a government agency's access to the offices of its employees, and the contents of those offices, cannot be conditioned upon prior compliance with standards of Fourth Amendment protection. (Pet. Br. at 13.)

They thus would make it the "rule" rather than the "exception" that the warrant requirement of the Fourth Amendment does not apply to government employers' entry into and search of their employees' offices. Under this argument, the warrant requirement would be inapplicable generally, rather than only to some specially sensitive governmental employment (such as police and other security forces)[10] or where there is particular danger of theft of government property,[11] and without regard to the nature and extent of the search. This argument is oblivious to the history and purpose of the Fourth Amendment's Warrant Clause as reaffirmed in *Barlow's*:

> The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the American colonial experience. * * * The general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists. "[T]he Fourth Amendment's commands grew in large measure out of the colonists' experience with writs of assistance * * * [that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." *United States* v. *Chadwick*, 433 U.S. 1, 7-8 (1977). * * * Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence. 436 U.S. at 311-12 (footnotes omitted).

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[10] *Cf. United States* v. *Speights*, 557 F.2d 362 (3d Cir. 1977).

[11] *Cf. United States* v. *Bunkers*, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975); *United States* v. *Collins*, 349 F.2d 863 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966); *Chenkin* v. *Bellevue Hospital Center, New York City Health & Hospitals Corp.*, 479 F. Supp. 207 (S.D.N.Y. 1979).

Of course, *Barlow's* and the other decisions in this Court which uphold a warrant requirement for the search of places of business do not address the precise question whether warrants can be dispersed with in all or some government employment contexts. But they do show that that issue cannot be decided by invoking the *Colonnade* and *Biswell* cases, which "represent responses to relatively unique circumstances"—liquor and firearms regulation. For, "effective supervision of its employees" by government (Pet. Br. at 13), though a weighty concern, is no more so than the public interest in employee safety and health, which is the goal of OSHA (as in *Barlow's*), or in the collection of taxes (as in *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977)).

Moreover, as we have shown in Part I, *supra*, Petitioners' search would be unconstitutional even without regard to the Warrant Clause, because the search was plainly unreasonable. The *Colonnade-Biswell* exception does not touch upon that question at all.

B. Petitioners contend that their conduct did not breach any "privacy expectation that society is prepared to recognize as reasonable." (Pet. Br. at 14; upper case omitted.) The heart of Petitioners' position is their assertion that a "public employee's right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the need of agency officials and supervisors to have access to the offices of public employees, and their contents, to monitor performance, administratively investigate work-related conduct, or merely to retrieve government records." (Pet. Br. at 16.)

This assertion of need, even if wholly justified (as it is not, see pp. 17-19, *infra*), would not justify the sweeping denial of privacy that Petitioners press upon this Court. Individual expectations of privacy are not unreasonable for purposes of the Fourth Amendment simply because the government has a need to make an unfettered search. Thus, while recognizing that "unless

Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered," this Court nevertheless held that the Fourth Amendment's warrant requirement applies to electronic surveillance of telephone conversations in domestic security investigations. *United States* v. *United States District Court*, 407 U.S. 297, 312 (1972).

The recent decision in *T.L.O.*, *supra*, is again very much in point. The Court recognized "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds," and described in some detail the seriousness of disciplinary problems in the schools. 105 S.Ct. at 742-43. Nevertheless, the Court rejected the State's contention that students in the public schools may claim no legitimate expectation of privacy. *Id.* at 742. Instead, the Court determined the scope of the Fourth Amendment in a school setting on the basis of a "balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place." *Id.* at 743. Even the Solicitor General acknowledges that "the employer recognizes that the employee may elect to keep some personal items in his office, [although] it is plainly the understanding of all concerned that the office will be used primarily for work-related purposes." (U.S. Br. at 9.) These "items" normally include private papers and correspondence. Unless directed otherwise by their employers, many individuals use their offices during nonworking hours for private correspondence, paying bills, preparing their tax returns and the like. If the employees' expectation of privacy in such materials is no longer one "that society is prepared to recognize as 'reasonable,'" it will cease to be the society the framers of the Fourth Amendment envisioned.

C. We may readily grant that there is frequently a "need of agency officials and supervisors to have access

to the offices of public employees." (Pet. Br. at 16.) But it is a substantial and unjustified leap from the indisputable fact "that in the ordinary course of business many employment situations occasionally involve routine unconsented entries into an employee's office for work-related purposes" (U.S. Br. at 11) to the conclusion that public employees can never have a reasonable expectation that their offices will not be entered. Where, as in the present case, employees have been permitted to and do lock their office doors, their expectation that their offices will not be entered without their knowledge and consent is wholly justified.[12] *See, e.g., U.S.* v. *Speights*, 557 F.2d 362, 364 (3d Cir. 1977);[13] *Gillard* v. *Schmidt*, 579 F.2d 825, 828-29 (3d Cir. 1978). They will thus leave private materials where they would not be when others are likely to come into their office (as in business hours), and the materials would be subject to view. The denial of a right of privacy in this situation is not necessary to enable agency officials and fellow employees to have ac-

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[12] Of course, the situation would be otherwise if employees have been put on notice that their employer has a key and may enter at any time. *Cf. Chenkin* v. *Bellevue Hosp. Ctr., N.Y.C., Etc.*, 479 F. Supp. 207, 215 (S.D.N.Y. 1979). The importance of the reliance element is also shown by *United States* v. *Blok*, 188 F.2d 1019 (D.C. Cir. 1951), on which Petitioners mistakenly place reliance. In the passage which follows immediately beyond that which is quoted at Pet. Br. at 16, the Court said:

> *In the absence of a valid regulation to the contrary appellee was entitled to, and did keep private property of a personal sort in her desk.* Her superiors could not reasonably search the desk for her purse, her personal letters, or anything else that did not belong to the government and had no connection with the work of the office. 188 F.2d at 1021, emphasis added.

[13] The "criminal nature of the investigation in *Speights*" (Pet. Br. at 18) is, of course, irrelevant to the reasonableness of the employee's expectation of privacy prior to any search (see pp. 11-12, *supra*). Thus, even if this fact were otherwise relevant, Petitioners' attempt to distinguish *Speights* would be untenable.

cess to offices in the normal course of a working day "to obtain a file or piece of correspondence, or borrow a paper clip" (Pet. Br. at 16), or for other purposes.

Accordingly, the proposition that public employees never have a reasonable expectation that their offices will not be entered cuts too deeply into the privacy interests protected by the Fourth Amendment. Since the Respondent in this case clearly had a reasonable expectation that his office would not be unlocked and entered (see pp. 15-17, *supra*), it is unnecessary for the Court to decide under what circumstances such an expectancy would be unreasonable, and this is a matter better left for decision on a case-by-case basis.[14]

Even less plausible is Petitioners' contention, not joined by the United States, that the employee does not have a reasonable expectation of privacy in his office desk or file cabinet.[15] Although Petitioners grandly assert that "[s]ociety has no interest in government offices, desks, and file cabinets becoming citadels of inefficiency" (Pet. Br. at 16), they fail to demonstrate that they will become such "citadels" unless agency officials enjoy an unfettered right to enter and search.[16] But the experience of centuries lies behind the societal interest which is truly at stake in this case, and which underlies the Fourth Amendment

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[14] The question of how extensive an examination of materials that are not hidden from view may be permitted after a constitutionally-permitted entry is not presented by this record.

[15] To be sure, where a file cabinet contains only work-related materials, or is one to which other employees have regular access, the expectation of privacy would ordinarily be unreasonable; but this does not justify a blanket exclusion of office file cabinets from Fourth Amendment protection.

[16] Of course, public employees can be required by their superiors to yield up government records or other work-related papers; but Petitioners, having required Respondent to take administrative leave, cannot rely on his consequent inability to give them any materials that they might legitimately have sought.

—"to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967).

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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